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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR JIMENEZ,

Defendant and Appellant.

2d Crim. No. B231056
(Super. Ct. No. PA065584)
(Los Angeles County)

Victor Jimenez appeals the judgment entered after a jury convicted him of being a felon in possession of a firearm (Pen. Code,¹ former § 12021, subd. (a)(1)),² possession for sale of cocaine, methamphetamine, and cocaine base (Health & Saf. Code, §§ 11351, 11351.5, 11378), possession of a controlled substance while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a)), and having a false compartment for purposes of transporting a controlled substance (false compartment activity) (Health & Saf. Code, § 11366.8, subd. (a)). As to the three counts of possession for sale of a controlled substance, the jury also found true allegations that appellant was personally armed with a firearm (§ 12022, subd. (c)). In a bifurcated proceeding,

¹ All further undesignated statutory references are to the Penal Code.

² Former section 12021 was repealed and reenacted as sections 29800 through 29875, effective January 1, 2011, operative January 1, 2012.

appellant admitted that he had a prior drug-related felony conviction (Health & Saf. Code, § 11370.2, subd. (a)) and had served two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to a total term of 20 years 8 months in state prison.

Appellant's sole contention on appeal is that the judgment should be corrected to reflect a total term of 20 years. He claims the abstract erroneously states that he was sentenced to one-third of the high term (i.e., one year eight months) on the personal firearm use enhancements (§ 12022, subd. (c)) that were imposed on two subordinate counts, when in fact the court sentenced him on both counts to one-third of the midterm (i.e., one year four months).³ We disagree. The record plainly reflects that the court selected the high term in calculating appellant's sentence as to both enhancements. Appellant's claim to the contrary is based on a misstatement that was subsequently corrected in a nunc pro tunc order.

In orally pronouncing appellant's sentence, the court selected count 7 (possession for sale of methamphetamine) as the principal term and imposed the high term of five years. The court then added a high term of five years for the personal firearm use allegation, for a total of 10 years. As to count 5 (possession for sale of cocaine), the court began by imposing a consecutive subordinate term of one year (one-third of the midterm of three years) in accordance with subdivision (a) of section 1170.1. The court then stated: "As to Penal Code section 12022 subdivision (c), the court is going to give a consecutive indicated which is one-third the term, *and the court is going to impose one-third the high term* under People versus Hall, H-A-L-L, at 119 Cal.App.4th. The high term will be five years. One-third thereof is one year and eight months." (Italics added.)

For the possession for sale of cocaine base as charged in count 6, the court imposed a consecutive subordinate term of eight months (one-third the midterm of two

³ Subdivision (c) of section 12022 provides in pertinent part that a "person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, . . . [or] 11378 . . . of the Health and Safety Code, shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for three, four, or five years."

years) and stated "[p]ursuant to Penal Code [section] 12022, subdivision (c), again, it's one-third the mid term -- strike that. *One-third the high term of five years*, for the reasons, again, I have stated, and that's one year and eight months." (Italics added.) The court proceeded to impose a consecutive subordinate term of eight months (one-third the midterm of two years) on the charge of false compartment activity. Sentences imposed on the remaining two counts were stayed under section 654.

At that point, the court stated that "[s]o far the total unstayed term is 15 years." The aggregate term that had actually been imposed, however, was 15 years 8 months—i.e., 10 years (count 7) plus two years eight months (count 5) plus two years four months (count 6) plus eight months (count 10). The court then added a consecutive three-year enhancement for appellant's prior drug-related felony conviction under Health and Safety Code section 11370.2, subdivision (a), plus consecutive one-year enhancements for each of appellant's two prison priors, for a total term of 20 years 8 months. The court, however, erroneously announced the total term as 18 years. At the conclusion of the hearing, the court stated: "I made two errors. One is addition error. One is a citation error. I said *People versus Hall* at 119 Cal.App.4th for one-third *the mid term* on the enhancement. I couldn't read my own writing. I looked at my card, it's *People versus Hill*, H-I-L-L, at 119 Cal.App.4th 85. [¶] I also made an addition error. *The sentence will remain as I indicated*, however, I added wrong. Instead of 18 years, it's 20. That will be the order." (Italics added.) A minute order to that effect was issued.

The court subsequently realized that its addition was still wrong. Accordingly, the court issued a nunc pro tunc order in which it corrected its prior minute order to state that appellant had been sentenced to a total term of 20 years 8 months, and not 20 years. The nunc pro tunc order makes clear that the prior order had been issued "through inadvertence and clerical error" and "does not properly reflect the court's order." The abstract of judgment, which was issued the day after the nunc pro tunc order, reflects a total state prison term of 20 years 8 months. The abstract also reflects that appellant received consecutive sentences of one year eight months for the personal firearm use enhancements on counts 5 and 6.

According to appellant, the court's reference to "one-third the midterm" in correcting its citation error, when considered in conjunction with its statement that the total term was 20 years, compels the conclusion that the court actually sentenced him to one-third of the midterm on the two firearm use enhancements. He goes on to argue that the court's nunc pro tunc order is an improper attempt to retroactively increase his sentence and violates his due process rights under the state and federal Constitutions. In support of his position, he quotes our Supreme Court for the proposition that "[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Appellant is not entitled to the relief he seeks. Contrary to his claim otherwise, the record plainly reflects that the court orally pronounced a sentence of one-third of the high term on the personal firearm use enhancements imposed on counts 5 and 6. Although the court subsequently referred to "one-third the midterm," its nunc pro tunc order makes clear that this reference was a misstatement. As appellant acknowledges, the court made the statement in correcting its citation to a case which stands for the proposition that courts may select the high term in calculating a defendant's sentence on a subordinate firearm use enhancement. (*People v. Hill* (2004) 119 Cal.App.4th 85, 88-92.) Appellant would nevertheless have us conclude that in referring to the midterm in this context the court intended to reverse the oral pronouncements in which it had selected the high term. We will not construe the record to compel such an obviously unintended result. (See *People v. Smith* (1983) 33 Cal.3d 596, 599 [where reporter's and clerk's transcript are in conflict and cannot be harmonized, "' . . . that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater

credence . . ."].)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Ronald S. Coen, Judge

Superior Court County of Los Angeles

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